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IN THE  
**Supreme Court of the United States**

October Term, 1964

No. **345**

STATE OF MARYLAND for the use of  
NADINE Y. LEVIN, *et al.*,  
*Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA,  
*Defendant-Appellant.*

STATE OF MARYLAND for the use of  
SYDNEY L. JOHNS, *et al.*,  
*Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA,  
*Defendant-Appellant.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

THEODORE E. WOLCOTT,  
*Attorney for Petitioners.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

Nadine Y. Levin, individually, and Joy Ellen Levin, an Infant by Nadine Y. Levin, her Guardian, and Mellon National Bank and Trust Co. as Executor of Jack Levin, deceased; Sidney L. Johns, individually, and Kennedy Smith, as Executor of the Estate of Ruth Johns, deceased, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit entered in these cases on April 1, 1964 and April 28, 1964.

## Opinions Below

The findings of fact and conclusions of law of the district court (Plaintiffs' Appendix 1b-20b<sup>1</sup>) are also reported in *State of Maryland for the use of Levin v. United States*, 200 F. Supp. 475 (W. D. Pa. 1961). The majority and dissenting opinions herein of the Court of Appeals below reversing the District Court by decision dated April 1, 1964 have not yet been reported. A copy of this decision is attached in the Appendix hereto at page 1a.

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Petitioner's application for re-hearing in the court below was timely filed on April 15, 1964 and was denied on April 28, 1964. By order dated June 23, 1964, this court extended the time herein for filing a petition for a writ of certiorari to and including September 25, 1964.

## Preliminary Note

At the outset the court's attention is respectfully called to the following:

1. The divided Court of Appeals below reached a result on the same issues of law and fact diametrically opposed to that reached in a companion case arising out of the same air collision in Maryland and decided on the same record by the unanimous Court of Appeals for the District of Columbia in *State of Maryland for the use of Meyer, Brady and Capital Airlines v. United States of America*, 322 Fed. 2d 1009, decided June 13, 1963 (Cert. den. 375 U. S. 954, Dec. 16, 1963), hereinafter referred to as *Meyer*.

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<sup>1</sup> "Plaintiffs' Appendix" References are to the "Appendix to Plaintiffs' Brief" filed in the Court of Appeals below and with the record in this Court.

2. The United States has stated that it will not oppose this petition. (Motion of United States for conditional rehearing of its Petition for a Writ of Certiorari in the *Meyer* case, No. 543, at page 4.)

### Questions Presented

1. Is a person who is employed on a full-time basis under the provisions of 32 U. S. C. § 709 (a) as a civilian caretaker of federal property, an employee of the United States?
2. If a person so employed is an employee of the United States, then, was the right of the United States to control him at the time of the occurrence such, that the United States, if a private person, under the respondeat superior law of Maryland, would be liable for his negligence under the Federal Tort Claims Act?

### Statutes and Regulations Involved

1. The pertinent provisions of the Federal Tort Claims Act (Title 28, United States Code Sec. 1346 (b) and Sec. 2671 are set out in Appendix hereto page 27a.
2. The National Defense Act of 1916 (39 Stat. 166) as amended, provides in pertinent part (Title 32, United States Code):

#### Section 709. *Caretakers and clerks.*

"(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section. . . .

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

There are additional pertinent parts of regulations showing the close governmental control over McCoy and the maintenance of its aircraft which will be found in the Petitioner's Appendix to this brief. These are the following:

Plaintiffs' Exhibit No. 15, National Guard Regulations No. 75-16. (App. p. 28a)

Plaintiffs' Exhibit No. 16, National Guard Regulations No. 75-16, Superseded. (App. p. 31a)

Plaintiffs' Exhibit No. 17, ANGR 40-01. (App. p. 32a)

Plaintiffs' Exhibit No. 3, ANG 40-01, Air National Guard Manual. (Pet. App. p. 34a)

Defendant's Exhibit No. 7, AFR 45-2. (App. p. 48a)

Defendant's Exhibit No. 9, ANGR 50-01. (App. p. 49a)

The following statutes are also set out in the Appendix:

5 United States Code 751. (App. p. 50a)

Article IA, sec. 10, Maryland Annotated Code 1951. (App. p. 51a)

### Statement

These are actions under the FTCA against the United States for the wrongful deaths of the plaintiffs' decedents, Levin and Johns, who were passengers in a Capital Airlines Viscount airplane, which was struck in midair by a T-33 jet fighter plane owned by the defendant, United States, but which had been allocated to the Maryland Air Guard as part of the overall national defense plans of the Air Force through the National Guard Bureau. Both aircraft were destroyed and all of the passengers and crews killed except



the pilot of the T-33 jet, Julius McCoy. At the time of the accident he was employed as a full-time civilian air maintenance technician under Sec. 709 (*supra*) as a caretaker of United States property engaged in duties of such employment. The findings of the District Court that McCoy was negligent and its allowance of damages were not disputed by the United States on its appeals from the judgments of that court.

**The proceedings below and in the companion Meyer cases:**

• The findings of fact of the trial court, Gourley, J. (Plaintiff-Appendix 1b-20b) were made on the record in the prior consolidated trials of the companion *Meyer* cases in which Judge Mathews (District Judge, District of Columbia) after hearing testimony of witnesses in open court, including McCoy, had found that at the time of the accident McCoy was a civil employee of the United States acting within the scope of his employment within the meaning of FTCA. (Judge Holtzoff later overruled the Government's motion for reconsideration of this issue.) The transcript of the evidence and exhibits in the *Meyer* consolidated trials were received in evidence in the instant *Levin* cases by the district court and virtually constituted the entire record on appeal before the Court of Appeals below. By permission of the court below the *Meyer* transcript, exhibits and the opinion, Findings of Fact and Conclusions of Law of U. S. District Judge Mathews were reproduced and bound together as Plaintiff's Exhibits Volumes 1, 2 and 3 and were handed up as part of the record on appeal therein. References herein made to that part of the record on appeal below will refer to pages of these three bound volumes as "Pl. Exh. " unless otherwise specifically noted.

The United States, in the above-mentioned *Meyer* cases appealed to the Court of Appeals for the District of Columbia. The judgments in the *Meyer* cases holding that McCoy



was a civilian employee of the United States acting in the scope of his employment at the time of the occurrence within the purview of the Federal Torts Claim Act, were affirmed in *United States to the use of Meyer v. State of Maryland*, 322 Fed. 2d. 1009 (*supra*).

In the instant *Levin* cases, the United States had also appealed from the judgments in the District Court in favor of the plaintiffs to the Court of Appeals for the Third Circuit. After the appeals in the *Levin* cases were argued and while decision therein was being awaited, the companion *Meyer* cases were unanimously affirmed on June 13, 1963. Certiorari was denied, December 16, 1963. It should be noted that in both the *Meyer* and *Levin* cases the Government's briefs and petition for a writ of certiorari were based upon identical points.

Copies of such *Meyer* decisions were immediately provided to the Court of Appeals below. Notwithstanding this, on April 1st, 1964 the Court below handed down a decision reversing the District Court and directing that judgment be entered in favor of the United States. This decision was by a divided court, the majority split by two separately based opinions by Judges Smith and Hastie, with a dissenting opinion by Judge Staley. Judge Smith held McCoy was not a federal civil employee, Judge Staley held he was, and Judge Hastie "did not reach that question."

### **The Facts**

#### **a. The Federal Civilian Employment Status of McCoy.**

The United States owned and provided the airplanes, paid for the fuel, and provided all the equipment for the National Guard Unit based at Martin Field (the 104th Fighter Interceptor Squadron), directly paid the salaries of the civilian personnel employed to maintain such federal property, furnished the spare parts, and made the major repairs (Pl. Ex. 678; Dist. Ct. Find. 3).

On the date of the accident, a Tuesday, McCoy was employed and acting as a full-time civilian air maintenance technician under the provisions of 32 U. S. C. § 709(a) (*supra*, p. 3) pursuant to the federal regulations and standards and paid directly by the Treasurer of the United States. He was also employed on a part time basis on certain weekends in a military capacity as a commissioned officer in the Air National Guard of the State of Maryland (Pl. Exh. 37-38, 41; Dist. Ct. Find. 4).

The National Guard Bureau, headquartered in the Pentagon, is authorized to regulate employment and rates of Compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951 (32 U. S. C. § 32, which became 32 U. S. C. § 709(a)). (Pl. Exh. 214, Dist. Ct. Find. 6).

Pursuant to 32 U. S. C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, promulgated Air National Guard Regulation 40-01, dated 20 December, 1954 (hereinafter referred to as ANGR 40-01) delegated certain duties to the Adjutants General of the several states. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the caretaker technician categories and prescribed the requirements, duties, rates of pay, hours and supervision (Pl. Exhs. 655-660; Dist. Ct. Find. 5).

In order to qualify as such air technician (caretaker) McCoy, by order of the Secretary of the Air Force, attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois. While attending this school, he was paid by the United States Air Force finance office (Pl. Exh. 43; Dist. Ct. Find. 7).

At the time of the accident, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence

of Major Mitchell, who was away on a training program (Pl. Exhs. 40, 48, 71; Dist. Ct. Find. 11). The job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (Pl. Exh. 217; Dist. Ct. Find. 18). In accordance with Air Force Regulations, McCoy flew frequent check flights, supervised maintenance of twenty-eight aircraft, and other equipment owned by the United States, and the seventy-five to eighty civilian maintenance personnel (Pl. Exhs. 37, 38, 40, 47, 58, 59, 68, 70, 71, 81, 306, 605; Dist. Ct. Find. 12) and submitted monthly equipment reports to the National Guard Bureau in Washington. (Pl. Exh. 43).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force officer on active duty with the United States Air Force was stationed at Martin Field (Pl. Exh. 330; Dist. Ct. Find. 9), and Air Force Inspection Teams made inspections (Pl. Exh. 307; Dist. Ct. Find. 10).

If the Air Force found that a civilian employee was not meeting its requirements, it could effect his discharge by stopping his salary. (Pl. Exh. 335; Dist. Ct. Find. 10).

As a full-time air technician, *i.e.*, in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (Pl. Exh. 38; Dist. Ct. Find. 13).

McCoy, in his full-time civilian caretaker air technician, job, was paid an annual salary in the sum of \$7,500.00 by check drawn on the Treasury of the United States. Additionally, he was paid approximately \$2,000.00 per year by the United States, for his part-time military duties (Pl.

Exh. 41; Dist. Ct. Find. 23) in the Maryland National Guard.

**b. Purposes of the Flight by McCoy on the Day of the Accident.**

On the morning of Tuesday, May 20, 1958, McCoy reported to the base and commenced work at the usual starting time on his regular full-time civilian caretaker job as aircraft maintenance chief (Pl. Exhs. 67, 68; Dist. Ct. Find. 26), and as acting maintenance supervisor in Major Mitchell's absence (Pl. Exhs. 77-78; Dist. Ct. Find. 11). Before the flight, he performed certain administrative duties, incidental to his civilian job (Pl. Exhs. 67, 78). On the date of the occurrence, he was recorded as present at the base only in his civilian capacity, was carried on the roster in his air technician pay status, and ultimately was paid by the United States Treasurer in this capacity (Pl. Exhs. 77-78; Dist. Ct. Find. 26).

McCoy could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National Guard in a military capacity (Pl. Exh. 586-87, Dist. Ct. Find. 24). At the time of the accident, McCoy had accumulated more than the number of flight training hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (Pl. Exh. 135-6, Dist. Ct. Find. 25). It was not a training mission (Pl. Exh. 80, 121, 136, 146-7, 152-3, 161-3, 586-7). The form used for this flight was all-purpose (Pl. Exh. 69).

McCoy received permission from his immediate superior, Kilkowski, to make the flight. Kilkowski, like McCoy, was employed pursuant to Sec. 709(a) in the air technician position of base detachment commander (Dist. Ct. Find. 14-15). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of

maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U. S. Sec. 709(a) (Dist. Ct. Find. 20). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (Pl. Exhs. 162-164, 493-495; Dist. Ct. Find. 21, 22).

McCoy was accompanied on the flight by a passenger, Donald Chalmers, a member of the Maryland Army National Guard. Chalmers had been required to sign a release prior to the flight, releasing the *United States* and the State of Maryland from liability due to "negligence, faulty pilotage, or structural failure of the aircraft" (Plaintiff-Appendix 5, Dist. Ct. Find. 28).

**c. Circumstances Subsequent to the Accident Further Confirming the Federal Employment Relationship.**

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U. S. C., § 751, which provides for payment of compensation by the United States to an employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim (Plaintiff-Appendix 21b-28b) were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee, on forms provided by the U. S. Department of Labor specifically used for caretakers-technicians (Pl. Exh. 240-241). After due investigation (Pl. Exh. 245) Col. Ebaugh certified as follows:

"I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard." (Pl. Ex. 228)

The Bureau of Employees Compensation, U. S. Department of Labor, processed the claim of McCoy and adjudicated that he was injured in the performance of his duty



as an employee of the United States at the time of the accident. Subsequently, at the request of the United States, and pursuant to the above Statute, McCoy executed an assignment to the United States of his rights of action against Capital Airlines and others (Dist. Ct. Find. 29-33). Such assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (Pl. Exh. 225-227). The United States at no time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

**d. The Additional Admissions by the Government.**

It is noteworthy that in its briefs in the Third Circuit and in the District of Columbia Court of Appeals and in its petition for a Writ of Certiorari in the *Meyer* cases the government conceded that McCoy was at least in part engaged in the performance of his duties as a civil air technician at the time of the accident.

In its brief to the Court below, the government in stating the "Questions Presented" said:

" \* \* \* because he (McCoy) was also performing duties incident to his employment as a civilian employee \* \* \* "

In its brief to the Court of Appeals in the District of Columbia, the Government stated:

"Regardless of whether Captain McCoy was also acting in his civilian capacity, *the situation presented by this case* \* \* \* " (Emphasis supplied)

In its Petition for the Writ of Certiorari in *Meyer*, page 14, the Government states that the first question is:

" \* \* \* Whether *civilian personnel* of the National Guard are 'employees of the United States.' " (Emphasis supplied)



Again at page 27 of the aforesaid Petition, the Government states that the air technician, Captain McCoy, was engaged at the time of the accident, in both flight training and in maintenance activity:

"Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both."

See also Judge Staley's observations to the same effect (Appendix hereto p. 25a).

**e. The Air National Guard.**

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U. S. C. Section 102.

The Air National Guard, including the 104th Fighter Interceptor Squadron, operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Exh. 3). (Pl. Exh. 663-664), the squadron's overall training area was considered to be the continental United States (Defendant's Circuit Court Brief, Supplemental App. 2a in *Meyer* cases). The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (Pl. Exh. 321).

In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour (Pl. Exh. 333).

## REASONS FOR GRANTING THE WRIT

**I. The Court of Appeals below has rendered a decision in direct conflict with the decision in the companion cases of the United States Court of Appeals for the District of Columbia on the same facts and issues.**

This split decision, reversing the district court, reaches a result diametrically opposed to that previously and unanimously reached by the District of Columbia Court of Appeals in the companion *Meyer* cases where precisely the same issues of agency based upon the same record were before that court. In *Meyer* the court unanimously held (a) that McCoy was a civilian employee of the government and (b) that he was acting within the scope of his employment within the purview of the F.T.C.A. thus fully affirming the district court below on the facts and on the law.

Furthermore, the issues herein are of widespread public importance and are concerned with an ever enlarging area of federal activity.

The reversal by the court below was achieved in a most unusual way. On the pivotal issue of whether McCoy was acting in his capacity as a civilian technician caretaker, Judge Smith was the only judge to directly hold that he was not. Dissenting Judge Staley disagreed fully, and followed the *Meyer* decision. Judge Hastie ignored material evidence and declined to pass upon this basic issue. It is respectfully submitted, as will be shown, that in order to reach a reversal herein the majority below disregarded fundamental rules and rights.

The peculiar feature of this case is such that "the scope of employment" cannot properly be determined without first determining the issue as to whether McCoy was an employee of the United States. Having refused to first

pass upon whether McCoy was a federal employee, Judge Hastie could not properly proceed to pass upon McCoy's function and scope of employment at the time of the accident. If McCoy was a federal employee by reason of Sec. 709(a), then as required by *Williams v. United States*, 350 U. S. 857, it was the duty of the court to give the petitioners the benefit of the strong presumptions under Maryland law that McCoy was an employee of the owner of the aircraft and that he was operating it within the scope of his employment. *Scott v. James Gibbons Co.*, 192 Md. 319, 62 A. 2d 117. This presumption which applies to the driver of an automobile is made applicable to the operator of an aircraft by Art. 1-A Sec. 10, p. 197, Ann. Code of Md. (Appendix hereto p. 51a). This significant presumption which can only be overcome by uncontradicted and conclusive proof, (*Scott, supra*) was the law of Maryland governing the issue of scope of employment and was brought to the attention of the court of appeals but was completely ignored by it in disregard of the mandate in *Williams v. United States*, viz., that the issue of scope of employment be determined in accordance with the law of the state where the wrongful act or omission occurred. Thus the court below decided the scope of employment issue as though there were no applicable presumptions under Maryland law.

It may be that Judge Hastie was unable to follow Judge Smith in his single-handed repudiation of a consistent line of decisions by the various federal courts of appeal uniformly holding that a technician caretaker in a non-activated State National Guard unit is a federal employee within the meaning of the FTCA. Judge Smith frankly conceded he was in conflict with these decisions, viz., *United States v. Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo v. United States*, 197 F. 2d 230 (5th Cir. 1952); *Courtney v. United States*, 230 F. 2d 112 (2d Cir. 1956); *United States v. Wendt*, 242 F. 2d 854 (9th Cir. 1957) and the *Meyer* decision. (Appendix hereto p. 10a).

As was pointed out by Judge Staley in his dissenting opinion:

"On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an 'employee of the Government' within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion."

In the prior companion *Meyer* cases the Court of Appeals for the District of Columbia expressly approved and followed the *Holly* line of caretaker cases. There the court ruled:

"We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States v. Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo v. United States*, 197 F. 2d 230 (5th Cir. 1952); *United States v. Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney v. United States*, 230 F. 2d 112 (2d Cir. 1956); *United States v. Wendt*, 242 F. 2d 854 (9th Cir. 1957). He was so employed to assist the National Guard, but also to assist the United States. In his property maintenance function he was paid, by, and the ultimate right of control over him was in, the United States." \* \* \* "The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status." (emphasis supplied)

Judge Smith's reasoning rests essentially upon the irrelevant considerations that military members of the Air National Guard not called into active service by the Federal Government are State and not Federal employees. In

order to escape the controlling authorities, and with no support from the concurring Judge, Judge Smith found it necessary to thread his way through an extraneous maze of constitutional and historical considerations, reaching a decision that "is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case." (Staley, J.).

As was stated by Judge Staley:

" \* \* \* On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. § 709(a) 'to care for material, armament, and equipment of the Air National Guard \* \* \*' which is property of the Federal Government."

Similarly in the *Meyer* case the District of Columbia circuit held:

" \* \* \* The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property." (Emphasis supplied)

This unusual rejection by Judge Smith of the long and well-established principle of the "caretaker as federal em-



ployee" in face of the *Meyer* decision, is rendered more anomalous when it is considered that Judge Hastie ignored entirely and Judge Smith regarded as "of no significance" the admissions by Col. Ebaugh and the U. S. Department of Labor that McCoy was working as a civil employee of the United States at the time and *not* as a member of the Maryland National Guard. Judge Hastie, in by-passing the caretaker issue, by-passed (together with Judge Smith) the admissions of the government and the undisputed testimony of both McCoy and Kilkowski, his superior, who authorized the flight, that at the time of the accident McCoy was performing the duties of his civilian employment.

It is respectfully submitted that the admissions (buttressed by uncontradicted facts), that McCoy was acting, at least in part, in his civilian capacity at the time, required the application of the important and unrebutted *respondent superior* presumption under Maryland law. (*Williams v. United States*, 350 U. S. 857; 1955.) This the majority below completely ignored, thereby depriving plaintiffs of substantial rights.

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant of the owner thereof. The presumption is rebuttable. *Keitz v. National Paving & Contract Company*, 214 Md. 479, 490; 134 A. 2d 296. Under the law of Maryland, it is also presumed that the agent, servant or employee of the owner of the vehicle was operating the vehicle within the scope of his employment. The presumption may also be rebutted. *Brown v. Bendix Aviation Corporation*, 187 Md. 618, 621, 622, 51 A. 2d 292 (1947); *Erdman v. Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935). The Court also overlooked the fact that under Maryland law McCoy could be acting at the same time for two employers (*Keitz, supra*).



**II. The Court of Appeals below has rendered a decision in conflict with the decisions of the Courts of Appeals of five different Circuits on the same Federal question.**

On the pivotal point of whether the unit-caretaker, McCoy, was a civilian employee of the United States, Judge Smith's Opinion becomes the first and only decision of a Court of Appeals to counter the caretaker decisions from *Holly* to *Meyer*. It also in effect overruled the third circuit's own decision in *O'Toole v. United States*, 206 F. 2d 912, 916 (1953) which had specifically approved the rationale of the *Holly* line of cases.

As Judge Staley observed, the effect of the instant decision is "to thwart the remedial purposes for which that statute (FTCA) was enacted." It should be noted that the Government through the Deputy Attorney General, had taken the position in a Senate bill hearing, that it was unnecessary to amend the FTCA to cover "civilian caretaker technicians" since the Government has been held responsible for their torts "in an unbroken series of court decisions" (*Meyer* opinion, Note 4).

**III. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.**

Judge Smith's opinion concluded that, even assuming McCoy in his civilian capacity was an employee of the United States, nevertheless he was not acting within the scope of his employment at the time of the accident. "The plain answer to this conclusion is, as the government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer" (Staley, *J.* in *Meyer*). Another answer is that six Federal Judges found otherwise, (District Court Judges Mathews and Gourley; Court of Appeals Judges Fahey,

Danaher, Burger and Staley; Judge Holtzhoff had declined to reexamine this issue.)

The majority below took the unusual step of making a new finding of fact that Captain McCoy was acting solely in his military capacity as an officer of the Maryland Air National Guard and not in his civilian capacity. In setting aside the finding of the trial court on that issue of fact, Judge Smith took the position that he was not bound by Rule 52(a), Federal Rules of Civil Procedure, which provides that findings of fact of the trial court:

“ \* \* \* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The findings of fact of the trial court ordinarily will not be disturbed unless clearly erroneous or unless the court finds “on the entire evidence” that it is “left with the definite conviction that a mistake has been committed.” *Sumnerbell v. Elgin Nat. Watch Co.*, 94 App. D. C. 220, 215 F. 2d 323 (1954) at p. 221; *Klimkiewicz v. Westminster Deposit and Trust Co.*, 74 App. D. C. 333, 122 F. 2d 957 (1941); *Schilling v. Schwitzer-Cummins Co.*, 79 App. D. C. 20, 142 F. 2d 82 (1944) at p. 22; *International Boxing Club v. United States*, 358 U. S. 242, 252; *United States v. United Steelworkers of America*, 271 F. 2d 676, aff'd 361 U. S. 39.

However, the Third Circuit held that Rule 52 (a) was not “applicable on the present appeal” because the actions in the Third Circuit were submitted to the trial court on the record which had been made in the related cases, in the District of Columbia, and the reviewing court was therefore:

“ \* \* \* in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal.”

In fact, the United States District Court for the District of Columbia was in the best position to evaluate the testi-

mony of the witnesses because it was in that Court that the witnesses had appeared and testified.

Judges Smith and Hastie then erroneously grasped at the use of a flight authorization form (Pl. Ex. Vol. I, p. 209) which contained the generalized words "flying proficiency". They chose to overlook the uncontradicted testimony that this broad general term included the *proficiency of the aircraft* and its operation by a civil maintenance technician-pilot in the course of his duties as such, which was a purpose of the subject flight; that this was not a training flight and that McCoy had already logged his required military flight time and was only being paid as a civil employee at the time of the occurrence. (McCoy—Pl. Exh. Vol. I, pp. 70, 71, 80, 120, 124, Vol. II, pp. 493, 494; Kilkowski—Pl. Exh. Vol. I, pp. 136, 138, 140, 146, Vol. III, pp. 587, 605, 606, 616; Gen. Wilson—Pl. Exh. Vol. I, pp. 58, 59, 306). It is respectfully submitted that the substitution of its own finding of fact by a split Appellate Court contrary to the findings below, the uncontradicted evidence, the presumptions under Maryland Law and the admissions of the defendant, in a tenuous ground upon which to rest an otherwise unsupported reversal which flies in the face of well-established decisions.

**IV. The Court below has decided an important question of federal law which has not been but should be passed upon by this Court.**

The court below has reached a conclusion that has the effect of one court of appeals (*Levin*) denying liability on the part of the government for one set of claimants (Viscount passengers' survivors) and another court of appeals (*Meyer*) finding liability on the part of the government for another set of claimants (Viscount pilots' survivors) even though the claims arise out of exactly the same set of facts.

There are three other suits against the United States for wrongful deaths of Viscount passengers arising out of this collision which are awaiting trial. All of these are pend-

ing in different circuits and each of said circuits are different from the Third Circuit and the District of Columbia Circuit. Further confusion and conflict may well be engendered. The Solicitor General has stated in his petition for rehearing of his application for a writ of certiorari in the companion *Meyer* cases that "the United States will not oppose (this) petition". It is apparent that the respondent, United States, appreciates that a situation has been created herein which should be reviewed by this court.

**V. The Doctrine of Collateral Estoppel is applicable.**

It may well be considered by this Court as applicable against the government here. In the *Meyer* companion cases, judgment on the common issue of liability became final when this Court denied certiorari on December 16, 1963.

It is respectfully submitted that the government became collaterally estopped on the issue of liability by the final judgment in the *Meyer* cases several months before the decision of the court below on April 1, 1964. In *United States of America v. Willard Tablet Co.*, 141 F. 2d 141, 144 (C. A. 7, 1944) the court said: "The doctrine of res adjudicata is not dependent upon mutuality of estoppel by Judgment, as contended by the government." See also *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 36 Del. 120 (1934); 30A Am. Jur. Sec. 393, p. 444; *The City of Lincoln*, 25 Fed. 835, 843 (S. D. N. Y. 1885).

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

August, 1964.

THEODORE E. WOLCOTT,  
Attorney for Petitioners.

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**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

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**Nos. 14,041 and 14,042**

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**STATE OF MARYLAND for the use of  
NADINE Y. LEVIN, et al.,**  
*Plaintiff-Appellees,*

**v.**

**UNITED STATES OF AMERICA,**  
*Defendant-Appellant,*

**STATE OF MARYLAND for the use of  
SYDNEY L. JOHNS, et al.,**  
*Plaintiff-Appellees,*

**v.**

**UNITED STATES OF AMERICA,**  
*Defendant-Appellant.*

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**APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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**Argued May 21, 1963**

**Before: STALEY, HASTIE and SMITH, Circuit Judges.**

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**OPINION OF THE COURT**

**(Filed April 1, 1964)**

**By SMITH, Circuit Judge.**

These appeals are from judgments in favor of the use plaintiffs in actions for wrongful death brought under



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the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671 and 2674. The deaths resulted from a mid-air collision between a commercial airliner owned by Capital Airlines, in which the decedents were passengers, and a jet trainer plane owned by the defendant and allocated to the Maryland Air National Guard pursuant to § 702(a), 32 U. S. C., and the regulations promulgated thereunder; the collision occurred within the territorial limits of Maryland. The federally owned plane was piloted by one Captain Julius R. McCoy, a rated pilot and a commissioned officer of the Air Guard, employed full time in civilian status as a maintenance technician holding the classified position of Aircraft Maintenance Chief. At the time of the accident the Maryland Air National Guard was not in the active service of the United States.

The trial court found that the sole proximate cause of the accident was "the negligence and wrongful conduct" of the pilot of the federally owned plane. This finding is not challenged here. The trial court also found that at the time of the accident the pilot was acting in his capacity as an "air technician," and, as such, "was a civil employee of the United States acting within the scope of his employment." This finding, on which the respondent superior liability of the defendant was predicated, is challenged as clearly erroneous and legally unsupportable. We find it necessary to dispose of two preliminary questions before entering upon a consideration of the principal issues raised by these appeals.

**PRELIMINARY QUESTIONS.**

The plaintiffs argue that under rule 52(a) Fed. Rules Civ. Proc., 28 U. S. C. A., the trial court's findings of fact may "not be set aside unless clearly erroneous." We do not agree that the "clearly erroneous" test is applicable on the present appeal. The actions were submitted to the



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trial court on the record made in the consolidated trial of related cases tried in the United States District Court for the District of Columbia. This record consisted primarily, although not entirely, of depositions and written exhibits as to which there was no dispute.

It has been held by this Court, and others, that under such circumstances the findings of fact are reviewable on appeal and need not be given the weight usually accorded them under the rule. *Surgical Supply Service, Inc. v. Adler*, 321 F. 2d 536, 539 (8th Cir. 1963); *Mayo v. Pioneer Bank & Trust Company*, 297 F. 2d 392, 395 (5th Cir. 1961); *Merchants National Bank and Trust Co. v. United States*, 246 F. 2d 410, 417 (7th Cir. 1957), cert. den. 355 U. S. 881 (1957), reh. den. 355 U. S. 920 (1958); *Lang v. First Nat. Bank of Houston*, 215 F. 2d 118, 120 (5th Cir. 1954); *In Re Kellet Aircraft Corp.*, 186 F. 2d 197, 200 (3rd Cir. 1950); *Orvis v. Higgins*, 180 F. 2d 537, 539, 540 (2d Cir. 1950), cert. den. 340 U. S. 810 (1950). We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal.

We note further that the consolidated trial of the related actions resulted in judgments favorable to the plaintiffs therein concerned. These judgments, one of which was reversed only on the issue of damages, were affirmed on appeal to the United States Court of Appeals for the District of Columbia. *United States v. State of Maryland*, 322 F. 2d 1009 (1963). A petition for a writ of certiorari was denied on December 16, 1963, 32 U. S. L. Week 3220. This denial "imports no expression of opinion upon the merits" of the cases involved, *United States v. Carver*, 260 U. S. 482, 490 (1923); *House v. Mayo*, 324 U. S. 42, 48 (1945); *Sunal v. Large*, 332 U. S. 174, 181 (1947), and is therefore of no significance in the instant appeals.

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### FIRST QUESTION.

The Federal Tort Claims Act imposes liability upon the United States for personal injury or death caused by the negligence or wrongful act or omission of "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. 1346(b). The term "employee of the government," as defined by statute, "includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, . . . ." 28 U. S. C. 2671.

The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute. The determination of the question requires consideration of the historical origin of the National Guard and the constitutional and statutory provisions under which it is organized, maintained, disciplined and regulated in its peacetime status.

### CONSTITUTIONAL AND STATUTORY PROVISIONS

The respective powers of the federal and state governments with relation to the militia forces are defined by Article 1, § 8 of the Constitution, which provides, in pertinent parts, as follows:

"The Congress shall have Power . . . , to . . . provide for the common Defence and general Welfare of the United States;

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"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

...; and

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These provisions established a division of mutually exclusive powers. There was vested in Congress the limited power to enact laws necessary to the effective organization of the militia forces which were deemed necessary to the common defense. There was reserved to the states the right to organize, maintain and regulate such forces and to appoint and commission their officers, a right which existed in and was exercised by the states prior to the adoption of the Constitution. *Selective Draft Law Cases*, 245 U. S. 366, 383 (1918). The quoted clauses made it manifest that the militia units were to remain subject to the control and authority of their respective states until called into the active service of the United States for the special purposes authorized.

The militia forces of the several states are, and, since 1903, have been organized and maintained as units of the National Guard<sup>1</sup> under joint federal-state auspices.

<sup>1</sup> The organized militia units of the several States and Territories were officially designated as the National Guard, a designation used by many of the states prior to the Dick Act.

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Act of January 21, 1903, 32 Stat. 775, commonly known as the Dick Act. However, the first comprehensive exercise of the Congressional power was the enactment of the National Defense Act of 1916, 39 Stat. 166, and the amendments contained in the Act of June 4, 1920, 41 Stat. 759.

The cited legislation provided for the reorganization of the Army of the United States, and, as an incident thereto, the organization and training of the National Guard units of the various states on a basis conforming to that of the Regular Army. However, it should be emphasized that both acts specifically declared that the organized Guard was to be a component of the Army of the United States only "while in the service of the United States." There was in each of the acts a specific recognition by Congress of the constitutional limitations on its power. This legislation did not alter the status of the National Guard units as independent military forces subject to the exclusive jurisdiction of the several states, except when mustered into the active service of the United States.

The enactments of 1916 and 1920 authorized the appropriation of funds for the support of the National Guard and the apportionment thereof among the states and territories whose organized units met the standards prescribed by the enactments and the regulations promulgated thereunder by the Secretary of War, a condition precedent to federal recognition. While Congress assumed full responsibility for the financial support of the National Guard units which qualified for federal recognition, it specifically recognized the constitutional authority of the several states and territories to organize, maintain and discipline their respective units under local law.

The statutes also authorize the procurement, at federal expense, of arms, equipment and material, and the issue thereof to the National Guards of the several states and territories upon requisition of their respective gov-

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ernors. As a condition precedent to the allocation of such property, the states were required to make adequate provision for its maintenance and protection. The relevant sections of the Act, and the amendments thereto, provided that the arms, equipment and material issue were to remain the property of the United States and, further, that the states would be held liable for the loss, damage or the destruction of property due to carelessness or neglect. It is clear that under the statutory plan the possession and control of the allocated property, as well as the responsibility for its care and maintenance in accordance with prescribed standards, were to be committed to the states.

The Acts of 1916 and 1920 were further amended by the Act of June 15, 1933, 48 Stat. 153. The only amendment here relevant (Section 5) established the "National Guard of the United States" as a "reserve component of the Army of the United States," consisting of the "federally recognized National Guard units" of the states. However, the statute did not alter the status of the Guard units or their relationship to the federal government. The amendment specifically provided that "the members of the National Guard of the United States *shall not be in the Active Service of the United States* except when ordered thereto in accordance with law, and, in time of peace, *They Shall be Administered, Armed, Uniformed, Equipped, and Trained in Their Status as the National Guard of the Several States.* . . ." (Emphasis supplied).

The laws relating to the military forces, including the National Guard, were revised and codified by the Act of August 10, 1956, entitled "An Act to revise, codify, and enact into law, title 10 of the United States Code, entitled 'Armed Forces', and title 32 of the United States Code, entitled 'National Guard'." 70A Stat. 1. This initial codification was restricted to the statutes which had become effective prior to March 31, 1955. The statutes which



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became effective thereafter were incorporated into the codification by the Act of September 2, 1958, 72 Stat. 1437. The purposes of the codification were to restate and clarify the existing laws and to eliminate earlier provisions which had become obsolete, particularly those contained in the Acts of 1916 and 1920. The substance of the laws was not changed.

The codification defined, as did the earlier legislation, a division of powers consonant with Article 1, § 8 of the Constitution, *supra*. There was reserved to the states the authority to organize, discipline, train and regulate their National Guard units, as theretofore, but in accordance with standards of training and discipline prescribed by the acts of Congress and the regulations promulgated thereunder by either the Secretary of the Army or Secretary of the Air Force. It is clear from the legislation that compliance with these standards was a condition precedent to the right of the states to federal recognition and subsidization.

### DISCUSSION.

At all times therein relevant, the pilot of the federally owned plane, Captain McCoy, held a dual status. He was a commissioned officer of the Maryland Air National Guard under appointment by the Governor. *Maryland Code*, Article 65, § 70. As a duly appointed and commissioned officer, he had qualified for federal recognition, pursuant to §§ 305 and 307 of Title 32 U. S. C., and the pertinent regulations, and by reason thereof his military earnings were paid directly from federal funds. We should add that in his military status Captain McCoy was the "aircraft squadron maintenance officer," a position comparable to the one he held in his civilian capacity.

In his civilian status Captain McCoy was a full-time maintenance technician employed by the Adjutant General

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of the Maryland National Guard, the person designated by the Secretary of the Air Force as the one authorized to employ civilian personnel. 32 U. S. C. § 709(f). He held the position of Aircraft Maintenance Chief and, as such, was responsible for the civilian employees in the Aircraft Maintenance Section<sup>2</sup> and the care, inspection and repair of aircraft and equipment. *Air National Guard Manual* (ANGM 40-01), p. 107. On the day of the accident he was "Acting Maintenance Supervisor" and, as such, was responsible for the operation of the Maintenance Division under the general supervision of Lt. Col. Kilkowski, a commissioned officer of the Guard who in civilian status held the position of Base Detachment Commander. *Air National Guard Manual* (ANGM 40-01), pp. 105 and 106. His civilian salary, like his military salary, was paid directly from federal funds pursuant to statutory authorization.

It was on the basis of the facts summarized in the foregoing paragraph that the court below held that Captain McCoy in his civilian status was an employee of the United States within the meaning of the Federal Tort Claims Act, *supra*. There is support for his holding in the cases herein-after considered and upon which the appellees rely.

The appellate courts have uniformly held that the federally recognized members of National Guard units not in active federal service are not employees of the United States within the meaning of the said Act. It has been held that they are employees of their respective states. *Williams v. United States*, 189 F. 2d 607 (10th Cir. 1951); *Dover v. United States*, 192 F. 2d 431 (5th Cir. 1951); *McCranie v. United States*, 199 F. 2d 581 (5th Cir. 1952), cert. den. 345 U. S. 922; *Storer Broadcasting Company v. United States*, 251 F. 2d 268 (5th Cir. 1958), cert. den. 356 U. S. 951; *Pattino v. United States*, 311 F. 2d 604

<sup>2</sup> A section within the Maintenance Division which was under the supervision of the Base Detachment Commander.

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(10th Cir. 1962), cert. den. 373 U. S. 911. But see *O'Toole v. United States*, 206 F. 2d 912 (3rd Cir. 1953).<sup>3</sup> We should emphasize that in each of the cited cases the Court regarded as of no significance the following facts: the Guard member had qualified for federal recognition, was compensated directly from federal funds, and was in possession and control of a federally owned vehicle involved in the accident which gave rise to claims for personal injury.

These appellate courts have held, also uniformly, that enlisted members of the National Guard, employed in civilian status as maintenance technicians pursuant to federal regulations, are employees of the United States within the meaning of the said Act. *United States v. Holly*, 192 F. 2d 211 (10th Cir. 1951); *Elma v. United States*, 197 F. 2d 230 (5th Cir. 1952); *United States v. Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney v. United States*, 230 F. 2d 112 (2nd Cir. 1956);<sup>4</sup> *United States v. State of Maryland*, *supra*. We emphasize that in each of these cases the Court regarded as significant, and somewhat determinative, the following facts: the maintenance technician qualified for employment under federal regulations, was paid directly from federal funds, and was responsible for the repair and maintenance of federally owned equipment in accordance with prescribed regulations. The courts held that by reason of the regulations under which the maintenance technician was employed and compensated, performed his duties, and was responsible for the maintenance of federally owned property, he was under the direction and control of the United States and therefore its employee.

It is difficult for us to perceive how factors may be considered immaterial in one situation and material in another which is comparable. We are of the view that the

<sup>3</sup> It was held that members of the National Guard of the District of Columbia were federal employees.

<sup>4</sup> But see dissenting opinion of Chief Judge Lumbard.

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rationale upon which the distinction has been held to rest is untenable for the reasons hereinafter discussed.

The Maryland Air National Guard, although federally recognized, was an independent military force of the State under the command jurisdiction of the Governor as "Commander-in-Chief of the land and naval forces of the State." *Maryland Constitution, Article I, § 8, Maryland Code, supra, § 6.* The Governor was empowered to make such rules and regulations as were necessary to the appropriate "organization, discipline, training and equipment" of the Guard in conformity with "the National Defense Act,<sup>5</sup> the amendments thereto,<sup>6</sup> and regulations made in pursuance thereof." *Ibid.* The Air Guard was under the immediate command of an Adjutant General "appointed by the Governor by and with the advice and consent of the [State] Senate." *Maryland Code, supra §§ 6, 9 and 10; 32 U. S. C. § 314(a).* The Military Department of the State was under the control of a ranking line officer on "active duty status" who, as Quarter Master General, was responsible "for the care, preservation and safekeeping of all military property," including that allocated to the Air Guard by the federal government. *Maryland Code, supra, §§ 10 and 11.*

The federally owned jet trainer involved in the collision had been purchased for and allocated to the Maryland unit pursuant to § 702 of Title 32 U. S. C., the pertinent provisions of which read as follows:

"(a) Under such regulations as the President may prescribe, . . . the Secretary of the Air Force may buy . . . and, upon requisition of the governor of any State . . . issue to its . . . Air National Guard, . . .

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<sup>5</sup> Act of August 10, 1956, *supra*.

<sup>6</sup> Act of September 2, 1958, *supra*.

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the supplies necessary to uniform, arm, and equip that . . . Air National Guard for field duty.

“(d) No property may be issued to the National Guard of a State . . . unless that jurisdiction makes provision, satisfactory to the Secretary concerned, for its protection and care.”

While the plane remained the property of the United States, 32 U. S. C. §710(a), it was committed to the possession and control of the Maryland Guard for its exclusive use.

The plane was loaned to the State of Maryland under statutory terms and conditions which were essentially contractual. The State was granted exclusive possession and control of the craft on condition that it assume full responsibility for its care and maintenance, in accordance with federally prescribed standards, and liability for any loss or damage occasioned by negligence. 32 U. S. C. §710(c). These conditions were limited to those which were essential to insure the care and protection of property purchased with federal funds. The State could be relieved of its accountability only under the conditions prescribed by statute, 32 U. S. C. §§ 704, 710 and 711.

The employment of Captain McCoy as a maintenance technician was pursuant to the pertinent provisions of § 709(a) and (f) of Title 32 U. S. C., which read as follows:

“(a) . . . Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. . . .



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“(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them.”

These provisions vested in the Secretary of the Air Force the right to spend federal funds for the employment and “compensation of competent persons”, and the authority to designate the person by whom they were to be employed. There was no other right or authority vested in the Secretary. The statute merely authorized compensation of state employed caretakers from federal funds, an authorization consistent with subsidization.

The person designated by the Secretary, pursuant to subdivision (f), *supra*, was the Adjutant General of the Maryland National Guard. He was authorized by appropriate regulation “to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise, and discharge employees within the purview of [the] regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.” *Air National Guard Regulations* (ANGR 40-01). The enumerated functions were exercised by the Adjutant General as the duly appointed representative of the State of Maryland; he was responsible only to the Governor. The right to employ maintenance technicians and other personnel and, as an incident thereto, supervise their work and the manner of its performance, was vested in the Adjutant General, as the representative of the State of Maryland. See *Harris v. Boreham*, 233 F. 2d 110 (3rd Cir. 1956).

The United States Court of Appeals for the District of Columbia Circuit concluded in the companion case, *United States v. State of Maryland*, *supra*, p. 1012, that Captain McCoy “in his civilian capacity as a caretaker of property of the United States” was an employee of the United States within “the terms of the Federal Tort Claims

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Act." The conclusion appears to be predicated on the same rationale as the earlier cases; in fact, the earlier cases are cited in support of it.

The Court stated, at page 1013:

"In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. . . . There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

We cannot agree with either the conclusion or the tenuous premise upon which it rests.

We have here a classic situation, of which there are many examples,<sup>7</sup> in which the Congress has undertaken the financial support of a state activity in the national interest, on condition that the activity conform to the congressional enactments and the regulations promulgated thereunder. The Congress, consistent with the limited

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<sup>7</sup> The Federal Aid Highway Act of 1958, 23 U. S. C. 101, et seq., under which Congress authorized the expenditure of federal funds and the apportionment thereof among the several states which assumed responsibility for the construction of highways as part of an interstate system of roads; the Hill-Burton Act and the amendments thereto, 42 U. S. C. 291, et seq., which authorized the appropriation of federal funds and the apportionment thereof among the several states, for the construction of hospitals and similar facilities.

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power vested in it by Article I, § 8 of the Constitution, *supra*, has undertaken to subsidize the National Guard units of the respective states, on condition that they be organized, maintained, disciplined and equipped in accordance with federally prescribed standards.

It is evident that the only purposes of the pertinent statutes, and the regulations promulgated thereunder, were to insure the effective organization of the National Guard and to protect federal funds against unrestricted expenditure, both in the national interest. There is nothing in the legislation which would indicate that it was the intent of Congress to either interfere with the right of the states to organize the Guard or deprive the states of the right to employ, supervise and control such civilian personnel as were deemed essential to the support of the Guard. We are of the view that in their relationships to the United States there is no distinction between a federally recognized member of the Guard and a federally recognized maintenance technician employed in his civilian capacity. A member of the Guard may qualify for federal recognition and compensation from federal funds only if he meets the standards prescribed by federal regulation; a maintenance technician may qualify for employment and compensation from federal funds only if he likewise meets the standards prescribed by federal regulation.

We are of the opinion, and so hold, that at the time of the accident Captain McCoy, in his capacity as maintenance technician, was an employee of the State of Maryland subject to the supervision and control of the Base Detachment Commander, who was in turn under the supervision and control of the Adjutant General. Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act, *supra*.

## Decision of Court of Appeals

### SECOND QUESTION

However, even if we assume that Captain McCoy, in his civilian capacity, was an employee of the United States, there remains a further question for decision. Was he acting within the scope of his employment as a maintenance technician at the time of the accident? Otherwise stated, was the activity in which he was engaged related to his employment as a maintenance technician and in furtherance of an interest of his alleged employer? The question must be decided under the law of Maryland, the place of the tortious conduct. 28 U. S. C. § 1346(b); *Richards v. United States*, 369 U. S. 1 (1962); *Pattino v. United States*, supra. The ultimate test is the relation or nonrelation of the tortious conduct to his work as a civilian employee. If Captain McCoy's activity at the time of the accident was within his line of duty as a member of the Guard, the United States cannot be held liable under the Federal Tort Claims Act. See the cases hereinabove cited.

It is the law of Maryland that an employer may be held liable in damages for personal injury or death caused by the tortious conduct of his employee only if, at the time of the accident, the employee was engaged in an activity in connection with the purposes of his employment and in furtherance of objects within his line of duty, *Lewis v. Accelerated Transport-Pony Express, Inc.*, 148 A. 2d 783 (1959); *Gloge Indemnity Company v. Victill Corporation*, 119 A. 2d 423, 427 (1956); *Eyerly v. Baker*, 178 A. 691, 696 (1935). The decisive test of the employer-employee relationship, essential to the creation of liability, is the right of the employer to direct and control the employee at the time and in respect to the very occurrence out of which the accident arose. *Greer Lines Company v. Roberts*, 139 A. 2d 235, 239 (1958); *Gallaghers Estate v. Battle*, 122 A. 2d 93, 98 (1956); *Henkelmann v. Metropolitan*

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*Life Ins. Co.*, 26 A. 2d 418, 423 (1942). The test is particularly applicable in the instant case.

In his military capacity Captain McCoy was a rated aeronautical officer assigned to the 104th Fighter-Interceptor Squadron of the Maryland Air National Guard. He was a qualified aviator and, as such, was permitted to fly federally owned aircraft when authorized to do so by the Base Detachment Commander. To maintain his level of efficiency and, incidentally, to retain his flying status, Captain McCoy was required by regulation to participate in the prescribed training programs and, in connection therewith, spend a minimum number of hours per year in aerial flight.<sup>8</sup>

These flights were designated as "proficiency flights," as distinguished from "functional check flights" which as the term indicates, had a different purpose. The proficiency flights had for their prime purpose training to improve flying skills. The training programs were under the control, supervision and command jurisdiction of the officers of the Maryland Air National Guard, subject only to the requirement that the programs conform to the standards prescribed by the Air National Guard Bureau. 32 U. S. C. § 501; *Air National Guard Regulation No. 50-01*.

In his military capacity Captain McCoy also held the position of "aircraft squadron maintenance officer." The duties and responsibilities of this post were somewhat similar to those of the maintenance technician. They were carried out under the command jurisdiction of Colonel Kilkowski, as squadron commander, a military post. Captain McCoy testified, as did Colonel Kilkowski, that on every flight the "squadron maintenance officer" would

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<sup>8</sup> The regulations fixed the minimum and maximum number of flight hours. When the maximum number of hours had been accumulated, a flying officer was no longer eligible for flight pay. Captain McCoy was in this situation at the time of the accident. However, the accumulation of additional hours was relevant to the officer's rating.



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evaluate the performance of the aircraft and report thereon to the appropriate officer. This was admittedly normal procedure even though the flight was one for the "purpose of maintaining flying proficiency."

The accident occurred on Tuesday, May 20, 1958, a day on which Captain McCoy was employed in his civilian capacity. He reported for work at the usual hour and, before taking off on the fateful flight, performed certain administrative duties related to his civilian employment.<sup>9</sup> However, pursuant to arrangements previously made, Colonel Kilkowski authorized Captain McCoy to make a "proficiency flight." The written Flight Order specifically designated the flight as one "for purpose of maintaining flying proficiency." Captain McCoy also had permission to carry a passenger, a member of the Army Reserve who was interested in joining the Air Guard. It appears from the undisputed testimony that the flight was not a "functional check flight," which is one made in connection with aircraft maintenance, and requires a minimum crew of two qualified men.

At the time of the accident Captain McCoy was engaged in a training flight which was under the control and supervision of the authorized military personnel of the Maryland Air National Guard. He was not acting within the scope of his employment as a maintenance technician but was acting within his line of duty as a commissioned aeronautical officer of the Guard. The fact that he was not eligible for flight pay and was retained in the civilian pay-roll status is of no relevance.<sup>10</sup> It is similarly of no rele-

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<sup>9</sup> On the day in question, Captain McCoy was carried in civilian pay status. He had accumulated the maximum hours of flight time for the period and could not qualify for flight pay.

<sup>10</sup> The accumulation of the maximum number of flight hours was not a bar to additional proficiency flights; in fact, it appears from the testimony that the number of hours spent in aerial flight was a factor in the evaluation of a pilot's proficiency and, consequently, his rating.

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vance that in accordance with normal flight procedure he checked the performance of the aircraft and reported thereon. This was his responsibility as "squadron maintenance officer," a military post.

After the accident Captain McCoy, having sustained injury, filed a written notice of claim for the benefits allowable under the Federal Employees' Compensation Act, 5 U. S. C. § 731. This claim was supported by the certificate of Lt. Col. Ebaugh, United States Property Fiscal Officer for the State of Maryland. The certificate stated that Captain McCoy was working "as a Civil Employee of the United States at the time of injury and not as a member of the Maryland National Guard." The claim was approved by the Department of Labor and the benefits allowable under the Act were paid. Whether the claim was properly or improperly approved we need not decide.

The appellees here argue that the certification, coupled with the subsequent approval of a claim for payment, was tantamount to a binding admission that Captain McCoy was a civil employee of the United States at the time of the accident. The argument is untenable for two reasons. An admission such as that made by Lt. Col. Ebaugh, unlike a judicial admission, is in no sense final and conclusive so as to bind the party on whose behalf it was purportedly made. *C. H. Elle Construction Co. v. Western Casualty & Sur. Co.*, 294 F. 2d 459, 461, 462 (9th Cir. 1961); *State Farm Mut. Auto Ins. v. Porter*, 186 F. 2d 834, 842 and 843 (9th Cir. 1950). The acceptance of the claim for compensation, supported as it was by Lt. Col. Ebaugh's statement, is of no significance. The doctrines of res judicata and equitable estoppel do not ordinarily apply to administrative determinations. *Jason v. Summerfield*, 214 F. 2d 273 (D. C. Cir. 1954), cert. den. 384 U. S. 840; *Niagara Mohawk Power Corp. v. Federal Power Commission*, 202 F. 2d 190 (D. C. Cir. 1952), affd. 347 U. S. 239. This is particularly true where, as here, the adminis-

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trative determination is subject to review at any time by the agency which made it. 5 U. S. C. §§ 787 and 788.

The judgments of the court below will be reversed and the actions remanded with directions that judgments be entered in favor of the defendant.

*HASTIE, Circuit Judge, concurring in result.*

I agree with Judge Smith that the flight during which this accident occurred was not an undertaking of a civilian caretaker in performance of his responsibility for aircraft maintenance. Rather, it was a "proficiency flight", a training activity, properly undertaken by Captain McCoy in his capacity as an officer of the Maryland Air National Guard.

The fact that any incidental observations this pilot might make concerning the performance of his plane would be communicated to and used by civilian technicians in the servicing or maintenance of the plane did not change the basic character of this training flight. Neither, as I see it, did it matter that the officer flying the plane had a second military responsibility as "squadron aircraft maintenance officer" and a separate and distinct civilian job at the airfield as a caretaker and aircraft technician. We all agree that in his capacity as a National Guard officer, whether functioning as a pilot or as the squadron aircraft maintenance officer, Captain McCoy was not a federal employee within the meaning of the Federal Tort Claims Act. I think it is irrelevant that as a civilian caretaker and mechanic he might put to use the information he had acquired during the performance of one or both of his other responsibilities as a National Guard officer.

The considerations and conclusions stated in the foregoing paragraph are a sufficient basis for reversing the judgment of the district court and requiring the dismissal of this action. Therefore, I do not reach the more difficult and far-reaching question, whether a civilian caretaker and

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technician, employed as provided in section 709 of Title 32, United States Code, is a federal employee within the meaning of the Tort Claims Act.

I join in the decision reversing the judgment of the district court, but without expressing any opinion upon that portion of the disagreement between my colleagues which concerns the status of civilian aircraft maintenance workers employed to care for federally owned planes while in the custody of National Guard units.

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*STALEY, Circuit Judge, dissenting.*

In my judgment the decision of the majority is erroneous for the reason that it is premised on the resolution of a question which is not germane to the issue in this case. The majority reasons that constitutional and historical considerations make it manifest that, for the purposes of the Federal Tort Claims Act, members of the Air National Guard are state and not Federal Employees. Until today that question had been left open in this circuit. *O'Toole v. United States*, 206 F. 2d 912 (C. A. 3, 1953). In the Second Circuit, see *Courtney v. United States*, 230 F. 2d 112 (C. A. 2, 1956). In my view, the United States maintains such control over members of the National Guard even while they have not been called into active service that they are "employees of the Government" within the meaning of the Federal Tort Claims Act. But I leave that question to another day, for, as the majority states, "The first and most important question for decision is whether the relationship between the United States and Captain McCoy, in his civilian position as an air technician, was that of employer and employee within the meaning of the statute." (Emphasis supplied.) On this question, historical and constitutional considerations as to the status of members of the National Guard are simply not relevant. For

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we are concerned with the status of Captain McCoy, not as a member of the National Guard, but as a civilian caretaker or air technician employed under 32 U. S. C. § 709(a) "to take care for material, armament, and equipment of the Air National Guard \* \* \*" which is property of the Federal Government.

On this, the vital question in this case, the majority candidly admits that each and every one of the reported cases is arrayed against it, for each of them holds that when acting in this capacity such a caretaker is an "employee of the Government" within the meaning of the Federal Tort Claims Act. See the cases cited in the majority opinion.

The undisputed evidence in this case makes it abundantly clear that in addition to his duties as a member of the Air National Guard, Captain McCoy was employed as a civilian maintenance technician pursuant to 32 U. S. C. § 709. Indeed, the record shows that the major portion of his salary resulted from his employment in this capacity, and that he was so employed on the very day of this tragic accident. Pursuant to § 709(f) his salary was fixed by the Secretary of the Air Force, who had designated the Adjutant General of the Maryland National Guard to employ him. Thus, in this capacity, McCoy was employed under Federal law, received his pay from Federal funds, cared for Federal property, and his duties were fixed by Federal regulation. As the Court of Appeals for the District of Columbia has held with respect to this very individual in companion suits brought by the survivors of others killed in this catastrophe, "In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States." *United States v. State of Maryland, for the Use of Meyer*, 322 F. 2d 1009, 1013 (C. A. D. C.), cert. denied, — U. S. — (1963). For an excellent exposition of these and additional fac-



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tors which compel the conclusion that a caretaker is an employee of the Federal Government, see *Elmo v. United States*, 197 F. 2d 230 (C. A. 5, 1952), and *United States v. Holly*, 192 F. 2d 221 (C. A. 10, 1951). We specifically approved the rationale of *Holly* in *O'Toole v. United States*, 206 F. 2d at 916. Thus, the effect of the majority's decision is to overrule our decision in that case.

The majority finds it difficult to perceive how the incidents of employment I have mentioned are material in considering McCoy's employment status as a civilian caretaker, but are not decisive in determining his employment status as a member of the National Guard. I have no such difficulty. There can be no question but that these indicia of employment represent significant, if not conclusive factors, in determining the employer-employee relationship. See *National Labor Relations Board v. Howard Johnson Co.*, 317 F. 2d 1 (C. A. 3, 1963), cert. denied — U. S. — (196 ). Hence, in ordinary circumstances, members of the National Guard would be considered Federal employees because substantial elements of control over them are vested in the United States. However, because of the constitutional provision with respect to the militia, several cases have held that members of the National Guard who have not been called into active service are state and not Federal employees. See the cases cited in the majority opinion. I have already indicated my disagreement with that conclusion. But, in any event, there is no such constitutional or statutory provision with respect to civilian caretakers. Accordingly, in determining their employment status an analysis of the incidents of employment is of critical significance. As has been previously indicated, such an analysis of McCoy's status as a civilian caretaker of Federal property leads to the ineluctable conclusion that, in this capacity, he was an employee of the United States.

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The majority states that as a full time maintenance technician McCoy was "employed by the Adjutant General of the Maryland National Guard." But this observation is not persuasive, for under 32 U. S. C. § 709(f), "the Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them." Thus in employing McCoy the Adjutant General was merely acting as the designee of the Secretary of the Air Force. As was stated in *United States v. State of Maryland, for the Use of Meyer*, 322 F. 2d at 1013:

" \* \* \* The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respect supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property."

In this setting, to hold that McCoy was a state and not a Federal employee for the purposes of the Federal Tort Claims Act is to thwart the remedial purposes for which that statute was enacted.

The majority also concludes that, assuming that Captain McCoy in his civilian capacity was an employee of the United States, he was not acting within the scope

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of his employment as a maintenance technician at the time of the accident. The plain answer to this conclusion is, as the Government concedes in its brief, that it is contradicted by the undisputed testimony of both Captain McCoy and his commanding officer. The testimony of the commanding officer who gave permission for the flight in question was given at the trial of the companion case in the District of Columbia. That testimony was made a part of the record in this case by the agreement of the parties.<sup>1</sup> As indicated in the opinion of the Court of Appeals for the District of Columbia, the commanding officer testified as follows:

"A. The general reason for any flight of this nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.

"Q. Were there other reasons for the flight in question?

"A. I think as I mentioned before, a third reason for any flight is to insure that the equipment is in

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<sup>1</sup> In that portion of its brief describing the proceedings in the district court, the Government relates that:

"The evidence at the trial on that issue consisted of the testimony of Captain McCoy, and his commanding officer, Lt. Col. Kilkowski, and others, and numerous exhibits and depositions, including the deposition of Major General Winston P. Wilson of the Arkansas Air National Guard, who has been on active (Federal) duty in the National Guard Bureau of the Department of Defense as the Assistant Chief for the Air National Guard. Both Captain McCoy and Lt. Col. Kilkowski testified that in their opinions they believed that Captain McCoy was performing duties in his civilian capacity as well as his military capacity, at the time of the accident."

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proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

“Q. As an aircraft technician?”

“A. As an aircraft maintenance officer in the squadron and also as an air technician.”

*United States v. State of Maryland for the Use of Meyer*, 322 F.2d at 1012.

The testimony of Captain McCoy is to the same effect. Certainly, in the light of this uncontroverted evidence, I cannot say that the district court erred in concluding that Captain McCoy was acting within the scope of his employment as a maintenance technician at the time of this accident.

I think that no more need be said; I would affirm the judgments of the district court.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit.*

**Pertinent Provisions of the Federal Tort Claims Act**

(Title 28, United States Code):

§ 1346. *United States as defendant.*

“(b) Subject to the provisions of chapter 171 of this title, the district courts, \* \* \* shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

§ 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term . . .

“ . . . ‘Employees of the government’ includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.”



**Plaintiff's Exhibit 15, National Guard Regulations  
No. 75-16**

(Pl. Exh. 634-39)

1. **Authority:** Accounting clerks and caretakers referred to in these regulations are employees authorized under the provision of section 90, National Defense Act, for the administration and care of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the several adjutants general of States, Territories, and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours (not to exceed 40 hours per week), and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (Pl. Exh. 635).
2. **Definitions:** The following definitions are applicable:
  - b. **Caretakers (Army)** are male, civilian employees authorized as supervisors, mechanics, and technicians. They may be divided into two main categories.
    - (1) **Unit Caretakers:** Employees who work directly under the supervision of a company or similar unit commander and are responsible to that commander for the care, maintenance, and repair of the unit equipment.
    - (2) **Pool Maintenance Caretakers:** Employees who work in or from fixed shops, under the direction of shop or pool supervisors and under the general supervision of the State maintenance officer. They are responsible for the inspection, repair, and reconditioning of equipment pertaining to National Guard organizations. (Pl. Exh. 635).

*Plaintiff's Exhibit 15, National Guard Regulations .*  
*No. 75-16*

c. *Caretakers (Air)* are male civilian employees authorized by law for maintenance, repair, and inspection of equipment issued to the National Guard Air units.

3. *Number*: The number of accounting clerks and caretakers authorized to be paid from Federal funds in each State will be announced periodically by the Chief, National Guard Bureau. This number will be based on geographic considerations, troop strengths, the amount and types of equipment issued to the State, and upon funds made available for the National Guard. The number of personnel actually paid from Federal funds may exceed the total specified from time to time by the Chief, National Guard Bureau, if employment is on a part-time basis and funds allotted for each job are not exceeded. (Pl. Exh. 636).

4b. *Caretakers (Army)*

- (1) *Unit caretakers* must be members of the National Guard and of the unit for which employed. They must be qualified to perform maintenance, at the organization level, on the equipment for which the unit commander will be responsible. Such qualifications will be determined by appropriate aptitude tests. (Pl. Exh. 636).

c. *Caretakers (Air)* must be members of the National Guard and must be able to perform the duties specified for the particular job in AAF Manual 35-0-1 "Military Personnel, Classification and Duty Assignment," 3 April 1944 (as revised) or WD TM 12-427 "Military Occupational Classification of Enlisted Personnel," 12 July 1944 (as revised). However, they may be trained in additional duties as may be required by the unit commanders. Commissioned officers of the

*Plaintiff's Exhibit 15, National Guard Regulations  
No. 75-16*

National Guard Air Units may be employed as caretakers only in the Military Occupational Specialty positions indicated in current chart for Permanent Caretaker Detachment, National Guard Air units. (Pl. Exh. 637).

- 7d. Payrolls will be certified by the bonded United States property and disbursing officer and approved by the State adjutant general or an officer designated by him. (Pl. Exh. 639).

**CHANGE No. 1**

NGR 75-16, 29 December, 1947, is changed as follows:

Authority: Accounting clerks and caretakers referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for the administration and care of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army had delegated to the several adjutants general of States, Territories and the District of Columbia, authority to employ, fix rates of pay, establish duties and work hours, and to discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (Pl. Exh. 646).

**Plaintiff's Exhibit 16, National Guard Regulations  
No. 75-16**

(Pl. Exh. 647) (Superseded)

1. *Purpose*: The purpose of these regulations is to outline the qualifications, duties, rights and obligations of the following personnel (hereinafter referred to collectively as "National Guard civilian personnel"): administrative assistants; accounting clerks; maintenance personnel; rangekeepers; and administrative, supply and maintenance technicians, and to prescribe the procedure for the payment of these individuals.
2. *Authority*: National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance repair and inspection of materiel, armament, vehicles and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau. (32 U.S.C.A. 42 and 42a; G.O. No. 96, Dept. of the Army, 9 Nov. 51).
3. *Definitions*: a. Administrative assistants are federally recognized officers, warrant officers or enlisted men employed as civilians to act as civilian administrative assistants to commanders in the performance of such duties, responsibilities and administrative matters for which the commanders are responsible, or may be required to perform (Pl. Exh. 648-649).

**Plaintiff's Exhibit 17, ANGR 40-01****SECTION I—General.**

1. **Purpose:** This Regulation provides a manning guide for the Air National Guard civilian personnel program and establishes policies and procedures applicable to Air National Guard civilian personnel. (Pl. Exh. 656).
2. **Policy:**
  - a. Air National Guard civilian personnel shall be utilized to effect maximum efficiency in administration, supply, operations, training, and maintenance of the Air National Guard.
  - b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:
    - (1) Females (when specifically authorized by the Chief, National Guard Bureau).
    - (2) Temporary personnel paid from funds other than those designated for the pay of air technicians.
  - c. Airmen type air technician positions may be transferred to other units or organizations, or the position may be changed to another authorized position at the discretion of the State adjutant general, except that such positions may not be transferred to or from Headquarters, State Air National Guard without prior approval of the Chief, National Guard Bureau.
  - d. Officer type air technicians positions may not be transferred or changed without prior approval of the Chief, National Guard Bureau. (Pl. Exh. 657)
  - e. Air National Guard civilian personnel may not accept outside employment which interferes or conflicts with



*Plaintiff's Exhibit 17, ANGR 40-01*

the performance of their Air National Guard civilian duties.

- k. Officers required to meet a Federal recognition board should not be employed prior to receipt of Federal recognition, and any individual if so employed accepts such employment at his own risk. Officers exempted from meeting a Federal recognition board may be employed and paid from the date the individual is appointed. Airmen may be employed upon completion of the oaths of enlistment.

- 1. The authority governing matters pertaining to Air National Guard civilian personnel is contained in this regulation and will be quoted as reference in special orders and other official action.

### 3. *Authority*

- a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.
- b. Authority is delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week) supervise and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau. (Pl. Exh. 658)

### 5. *Definitions*: For the purpose of this Regulation:

- a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

- (1) Air technicians means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians. (Pl. Exh. 659)

**Plaintiff's Exhibit 3 (Pl. Exh. 210)**

ANGM 40-01

## AIR NATIONAL GUARD MANUAL

CIVILIAN PERSONNEL  
MANUAL

1 March 1958

Department of the Air Force—National Guard Bureau  
ANG Manual                      Department of the Air Force  
40-01                              Washington, 1 March 1958

## FORWARD

The Air National Guard Civilian Personnel Manual is issued to provide staff and operating personnel with a convenient reference to the titles, grade, job number and duties of civilian personnel in the Air National Guard. Provisions are also included for the submission of recommendations for new or revised positions, grades and titles.

Provisions of this manual will govern all Air National Guard civilian employees, including those employed on a temporary hourly rate basis except those hired wholly from State or service contract funds, and will become effective as of 1 April 1958.

All Air National Guard civilian personnel will be permitted access to the contents of this manual and will be

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

fully acquainted with the duties and responsibilities of their positions.

Recommendations or suggestions for the improvement of procedures or position descriptions of this manual are encouraged. Comments may be forwarded to National Guard Bureau, NG-AFOTP, Washington, D. C.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

EDGAR C. ERICKSON  
Major General  
Chief, National Guard Bureau

## OFFICIAL:

JAMES E. BARBER  
Colonel, NGB  
Executive

## DISTRIBUTION:

1 ea AG

1 ea USP&FO

4 ea Flying Detach

1 ea Non-Flying Detach

The listing below is in numerical order according to job numbers. The status indicates the position can be occupied by Officer (O), Warrant Officer (WO),\* Airman (A), Female (F), and Non-Guardsman (X). The job title and career field title indicate the technician job title and corresponding Air Force career field and title. These are the new position numbers and titles; for the conversion see Section II, Paragraph 12.

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\* An airman who is appointed warrant officer may be retained in his airman type position. A warrant officer will not be hired direct into airman type positions except into the position of Aircraft Maintenance Chief, Job Number 43-10.

## Plaintiff's Exhibit 3 (Pl. Exh. 210)

Job No.	Status	Job Title	Career Field and Title
00-00	O	Base Detachment Commander	00 Commanders
00-01	O	Base Detachment Commander	00 Commanders
00-02	O	Base Detachment Commander	00 Commanders
00-03	O	Training Site Supervisor	00 Commanders
00-04	O	Training Site Supervisor	00 Commanders
14-00	O	Operations Supervisor	11 Opns & Tng
14-01	O	Flying Training Instructor	11 Opns & Tng
23-00	O	Intelligence Photo Radar Supv	23 Photographic
23-10	A	Photo Technician	23 Photographic
23-11	A	Photo Tech and Repairman	23 Photographic
23-12	A	Photo Lab Technician	23 Photographic
23-13	A	Camera Repairman	23 Photographic
27-10	A	Air Operations Specialist	27 Air Traffic Cont & Wng
27-11	A	Air Operations Technician	27 Air Traffic Cont & Wng
30-00	O	Communications Supervisor	30 Comm & Electronics
30-01	O	Radar Station Commander	30 Comm & Electronics
30-02	O	Radar Station Commander	30 Comm & Electronics
30-03	O	Tactical Control Sq Commander	30 Comm & Electronics
30-04	O	Tactical Control Gp Commander	30 Comm & Electronics
30-05	O	Comm & Electronics Supervisor	30 Comm & Electronics
30-10	A	Radio-Radar Maint Supt. (Ground)	30 Radio-Radar Systems
30-11	A	Radar Maint Tech (Airborne)	30 Radio-Radar Systems
30-12	A	Radar Mechanic (Airborne)	30 Radio-Radar Systems
30-14	A	Radar Maint Technician (Gnd)	30 Radio-Radar Systems
30-15	A	Radar Mechanic (Ground)	30 Radio-Radar Systems
30-17	A	Radio Maint Tech (Airborne)	30 Radio-Radar Systems
30-18	A	Radio Mechanic (Airborne)	30 Radio-Radar Systems
30-20	A	Radio Maintenance Tech (Gnd)	30 Radio-Radar Systems
30-21	A	Radio Mechanic (Ground)	30 Radio-Radar Systems
30-23	A	Communications Technician	30 Radio-Radar Systems
32-10	A	Fire Control Superintendent	32 Fire Control Systems
32-11	A	Fire Control Technician	32 Fire Control Systems
32-12	A	Fire Control Specialist	32 Fire Control Systems
34-10	A	Flight Simulator Technician	34 Training Devices
34-11	A	Flight Simulator Specialist	34 Training Devices
34-12	A	Synthetic Trainer Technician	34 Training Devices
42-10	A	Hydraulic Technician	42 A/C Accessories Maint
42-11	A	Propeller Technician	42 A/C Accessories Maint
42-13	A	Instrument Technician	42 A/C Accessories Maint
42-14	A	Electronic Fuel Cont Tech	42 A/C Accessories Maint
42-15	A	Electrical Technician	42 A/C Accessories Maint
42-16	A	Electronic Fuel Cont. Specialist	42 A/C Accessories Maint
43-00	O	Maintenance Supervisor	43 Maint & Engineering
43-10	O, WO-A	Aircraft Maintenance Chief	43 Aircraft & Eng Maint
43-11	A	Chief Maintenance Inspector	43 Aircraft & Eng Maint
43-12	A	Maintenance Inspector	43 Aircraft & Eng Maint
43-13	A	Aircraft Maint Technician	43 Aircraft & Eng Maint
43-14	A	Senior Aircraft Mechanic	43 Aircraft & Eng Maint
43-15	A	Aircraft Mechanic	43 Aircraft & Eng Maint
43-16	A	Jet Eng Maint Supt	43 Aircraft & Eng Maint
43-17	A	Jet Engine Technician	43 Aircraft & Eng Maint
43-18	A	Jet Engine Mechanic	43 Aircraft & Eng Maint
43-19	A	A/C Dock Superintendent	43 Aircraft & Eng Maint
43-20	A	Flight Engineer Technician	43 Aircraft & Eng Maint
45-10	A	Production Scheduling Tech	45 Productions Control

## Plaintiff's Exhibit 3 (Pl. Exh. 210)

Job No.	Status	Job Title	Career Field and Title
46-10	A	Munitions & Weapons Tech	46 Munitions & Wpns Maint
46-11	A	Munitions and Weapons Spec	46 Munitions & Wpns Maint
47-10	A	Motorized Equip Superintendent	47 Motor & Misc. Maint
47-11	A	Mechanic (General)	47 Motor & Misc. Maint
47-12	A	Gnd Pow & Support Equip Rpmn	47 Motor & Misc. Maint
47-13	A	Vehicle Operator (Mechanic)	47 Motor & Misc. Maint
53-10	A	Machinist	53 Metal Working
53-11	A	Sheet Metal Technician	53 Metal Working
53-12	A	Welder	53 Metal Working
55-00	O	Instals Facilities Supv	55 Instals Engineering
57-10	A	Crash/Fire Rescue Specialist	57 Firefighting
58-10	A	Parachute Rigger & Repairman	58 Fabric, Lthr & Rubbr
59-10	A	Boat Master	59 Marine
59-11	A	Marine Engineer	59 Marine
64-00	O	Supply Supervisor	64 Supply
64-01	O	Assistant Supply Supervisor	64 Supply
64-10	A	Editing & Doc Control Tech	64 Supply
64-11	A	Supply Records Specialist	64 Supply
64-12	A	Refueling Unit Operator	64 Supply
64-13	A	Warehouse Specialist	64 Supply
64-14	A	Warehouse Specialist (Apr)	64 Supply
64-15	A	Petroleum Specialist	64 Supply
64-16	A	Clerk Parts (Maintenance)	64 Supply
64-17	A	Purchasing & Contracting Spec	64 Supply
64-18	A	Warehouse Superintendent	64 Supply
64-19	A	Inventory and Inspec Spec	64 Supply
64-20	A	Supply Records Superintendent	64 Supply
64-21	A	Org Supply Superintendent	64 Supply
64-22	A	Org Supply Technician	64 Supply
64-23	A	Clerk Parts (Maintenance)	64 Supply
64-24	A	Org Supply Specialist	64 Supply
64-25	A	Transportation Specialist	64 Supply
64-26	A	Supply Specialist (Apr)	64 Supply
67-10	A	Accounting Specialist	67 Fin, Acctg & Auditing
67-11	A	Finance Specialist	67 Fin, Acctg & Auditing
68-00	O	Accounting Supervisor	68 Comptroller
68-01	O	Accounting Supervisor	68 Comptroller
68-02	O	Accounting Supervisor	68 Comptroller
70-01	O	Administrative Supervisor	70 Administration Services
70-02	O	Administrative Supervisor	70 Administration Services
70-03	O	Administrative Supervisor	70 Administration Services
70-04	O	Administrative Assistant (State)	70 Administration Services
70-05	O	Administrative Asst. (State)	70 Administration Services
70-06	O	Administrative Asst. (State)	70 Administration Services
70-11	A	Administrative Technician	70 Administration



*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

SECTION I

GENERAL PROVISIONS

1. *Format*

This manual is issued in loose-leaf form to facilitate reference and current maintenance. Changes to this manual will be effected by rescission, additions, and deletions of specific pages or of entire sections, based on the extent of change to be effected.

2. *Maintenance of Manual*

a. Copy or copies of this manual will be maintained by each office listed on the distribution. Any changes will be forwarded by numbered transmittal sheets and inserted in the appropriate space within the manual.

b. The following internal distribution is recommended:

(1) Each major functional area at a flying base should maintain a copy of the manual—supply, maintenance, operation and administration. The other functional areas will consult the administrative copy.

(2) Each non-flying detachment not located on or not fully dependent on a flying base should maintain a copy to include Headquarters State Air National Guard, electronics and communications units or detachments and other detachments that "need to know" may request copies from National Guard Bureau, AFOTP.

3. *Delegation of Authority*

The authority of the National Guard Bureau to regulate the employment and rates of compensation is contained

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

in Department of the Army General Order 96, dated 9 November 1951, subject, "Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau."

#### 4. *Policy*

a. It is the policy of the National Guard Bureau that positions will be classified in an orderly manner to provide a systematic basis for salary or wage determination, as well as for the application of the various processes of air technician personnel management and administration. This policy, applied within the framework of governing laws and regulation, will facilitate the equal treatment within each classification and pay category of employees performing comparable work.

b. In order that this policy may be made operative, it is necessary that pay rates bear a direct relationship to the level of responsibility and qualification required for the work performed. Through a process of job evaluation both National Guard Classified (NGC) and National Guard Maintenance (NGM) positions are graded to provide for the equitable application of the appropriation salary or wage schedules.

c. To provide for effective administration of the program, the classification structure will be maintained through periodic manpower management surveys and desk audits of positions.

#### 5. *Responsibility*

a. Adjutants general of various States, Territories, Puerto Rico or the District of Columbia will be responsible for:

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

(1) Insuring that the requirements and policies of the Air National Guard position classification program are followed at all air technician detachments.

(2) Furnishing recommendations, suggestions, and information to the National Guard Bureau on matters pertaining to classification standards, or on policies, techniques, and procedures affecting the position classification program.

(3) Maintains contact with the Civilian Personnel Office at nearest military installation and assists him in gathering information necessary for proper adjustment of the locality pay schedule.

b. The base detachment commander or senior air technician will be responsible for:

(1) Implementing and maintaining the position classification program as a means to facilitate the personnel management process in the accomplishment of the air technician detachment mission.

(2) Furnishing the State adjutants general with information, suggestions, or recommendations pertinent to classification policies, techniques, and procedures affecting the position classification program.

(3) Promoting the position classification program and assuring its understanding and implementation by supervisors and all employees.

(4) Keep current on the standard pay rates in their locality and advise the adjutant general of material changes. Maintain close coordination with the Civilian Personnel Office at the nearest military installation.

## *6. Categories of Positions*

There are two major categories of positions in the National Guard Air Technician Program which are the

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

o National Guard Classified (NGC) type and the National Guard Maintenance (NGM) type.

a. National Guard Classified Type Positions (NGC). This type of category is characterized by administration, clerical, certain supervisory and professional type positions. Numerical designations of the grade are the same as those in the General Schedule of Employees of the United States Civil Service. The National Guard Bureau is guided by the Classification Act of 1949 and pay rates for this category are controlled by Congressional action.

b. National Guard Maintenance Type Positions (NGM). This type of category is characterized by trade, craft, maintenance, and labor type positions. These positions are similar to United States Civil Service Wage Board positions and pay rates are adjusted by periodic surveys conducted by the Army-Air Force Wage Board. The following pay rates are included in this category classification:

(1) *National Guard Maintenance (NGM)*. Technically skilled positions primarily concerned with the accomplishment of specific tasks and duties related to crafts, trades, maintenance of equipment and physical labor. The employees in these positions accomplish tasks and duties as directed by supervisory personnel.

(2) *National Guard Maintenance—Leader (NGM-L)*. Technically skilled positions in which the employees exercise responsibility for the work of the positions stated in (1) above, and participate in the accomplishment of assigned duties and tasks.

(3) *National Guard Maintenance—Supervisor (NGM-S)*. Technically skilled positions primarily concerned with direct supervision of the duties and tasks assigned to the employees in positions (1) and (2) above. Incumbents of

*Plaintiff's Exhibit 3 (Pl. Ex. 210)*

these positions must be qualified to perform the work assigned to the employees under their supervision.

### 7. Use of Manual

A copy of this manual will be available for review and reference by supervisors and by employees. Ready access to the manual is essential for an understanding by Air National Guard civilian and military commanders of the responsibilities of Air National Guard civilian personnel.

## MAINTENANCE SUPERVISOR

Grade: NGC-11.

Job Number: 43-00

### 1. NATURE AND PURPOSE OF WORK:

#### A. Introduction:

The position is located in the Maintenance Division of an Air Technician Detachment. The incumbent is responsible for coordination, supervision and control within the maintenance division for aircraft maintenance, (field and organizational type), electronics, motor vehicle and support equipment. Incumbent will maintain proper administrative practices when carrying out his responsibilities, using all accepted management principles.

#### B. Duties:

1. Supervises the Production Control Section to assure that all activities of maintenance are planned and coordinate properly. Arranges for work assignments and deadlines on priority jobs in coordination with production control.



*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

2. Will supervise the Quality Control activity to assure that the section complies with all technical orders and similar directives on aircraft maintenance, inspections, and like activities.

3. Establishes, directs, and administers policies and procedures for all maintenance functions to include: electronics, electrical, hydraulics, machinist, welder, instruments, auxiliary hangar equipment, engine shop, motorized equipment, etc.

4. Advises or assists superintendents of the various maintenance areas in the more difficult technical problems involving supply, maintenance, repair, modification and storage. Recommends actions regarding requisitions and disposition of property.

5. May conduct a school or training class for the purpose of training present or future superintendents in the technical administrative problems involving the various functions of management.

6. Is responsible for ground safety, fire and crash rescue as concerns the Maintenance Division.

7. Responsible for personnel practices in the Maintenance Division to include: approval of leave, recommends promotions, separations, transfers, disciplinary actions, interviews new employees, etc.

8. Responsible for obtaining bids for contractual maintenance services. Formulates instructions, specifications, and other material necessary to obtain bids. Decides what bid to accept and assures completeness of contract with coordination with the Base Supply Supervisor.

**Plaintiff's Exhibit 3 (Pl. Exh. 210)****C. Responsibility for Work of Others:**

1. The incumbent is directly responsible for the Aircraft Maintenance Chief, Communications and Electronics Supervisor, and Motorized Equipment Superintendent.

2. The total maintenance area is controlled and managed by the Maintenance Supervisor which involves a minimum of 30 Civilian Air Technician employees.

**II. SCOPE AND EFFECT OF WORK:**

The incumbent is responsible for the efficient management of the maintenance shop, electronics, motor vehicles, and all allied activities. The degree of efficiency with which he operates will directly reflect in the over all operation of the Air National Guard.

**III. SUPERVISION AND GUIDANCE RECEIVED:**

Under general supervision of the Base Detachment Commander. The incumbent develops his own work procedures, generally establishes priorities and is primarily responsible for operation of the Maintenance Division.

**IV. MENTAL DEMANDS:**

Must be thoroughly familiar with all operations of the Maintenance Division to include all aircraft repair and maintenance, motorized equipment repair, ground safety, supply, etc. Must be able to advise or answer any technical question involving his division. Occasionally operates maintenance function under extensive heavy workload, which calls for organized planning and coordination within the section.

**Plaintiff's Exhibit 3 (Pl. Exh. 310)****V. PERSONAL WORK CONTACT:**

Contacts are with subordinate personnel Base Detachment Commander, Air Force Inspectors, and visiting personnel from the Air Force and the National Guard Bureau.

**VI. QUALIFICATIONS:****A. Mandatory:**

1. Must possess six years overall experience in all phases of aircraft maintenance and repair of allied equipment.
2. Completion of an Air Force course in maintenance.
3. Must have management background, either military or civilian.

**B. Desirable:**

1. Completion of an Air Force maintenance management course.
2. Be a rated pilot on flying status to enable incumbent to make test flights on assigned aircraft.

**AIRCRAFT MAINTENANCE CHIEF**

Grade: NGMS-9

Job Number: 43-10

**1. GENERAL:**

The position is located in the Aircraft Maintenance Section, Maintenance Division of an Air Technician De-

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

tachment. The incumbent is responsible for hangar and flight-line maintenance, inspections, and repair of all aircraft, jet or conventional, assigned and transient. Incumbent must be thoroughly familiar with all technical phases of aircraft maintenance and allied equipment. Required to know and understand management principles and their application when dealing with subordinates. The efficiency with which the incumbent performs his work will contribute greatly to the over-all mission of the Air National Guard within a State.

**II. DUTIES AND RESPONSIBILITIES:**

1. Responsible for production planning and control of the Aircraft Maintenance Section, coordinating activities with the Production Scheduling Technician and the Maintenance Supervisor. Arranges for work assignment and deadlines on priority jobs in coordination with production control.

2. Directly supervises all field type maintenance (hangar maintenance) including aircraft docks, and all shops. The shops consist of hydraulic, propeller, instrument, electrical, jet engine repair and build-up, sheet metal, and machinist.

3. Directly supervises all flight line maintenance (organizational maintenance) including all unscheduled maintenance.

4. Assigns work to subordinates considering individual skills, aptitudes and knowledge.

5. Performs necessary follow-up on all assigned jobs. Must be aware of any work stoppage, problems or bottlenecks that may occur during the operation and take neces-

*Plaintiff's Exhibit 3 (Pl. Exh. 210)*

sary steps to resolve these difficulties. Maintenance duties which will be accomplished consist of: scheduled aircraft and engine inspections, scheduled engine and accessory change, unscheduled maintenance, etc.

6. Conducts personnel actions that may include; approval of annual and sick leave and forwards it for final approval, settles complaints arising from work assignments, pay and job requirements, takes necessary action to create good work habits, and shifts personnel as required to meet peak workloads. Refers problems to the Maintenance Supervisor when they cannot be settled at this level.

### III. PHYSICAL WORK EFFORT:

Active; climbs, working in straining position.

### IV. WORKING CONDITIONS:

Inside and outside work; in proximity of moving propellers and jet engine blasts; danger of falling; danger of fumes and fire from high octane gasoline.

### V. QUALIFICATIONS:

#### A. *Mandatory:*

1. Minimum of five (5) years' experience as an Aircraft Maintenance Technician, either civilian or military capacity.

2. Capable of researching, reading, and understanding technical orders, technical manuals, and stock lists.

3. Must be familiar with Air National Guard and Air Force aircraft maintenance procedures.

#### B. *Desirable:*

Graduate of formal maintenance training courses equivalent to the requirements for an A&E certificate.



**Defendant's Exhibit 7. AFR 45-2 (Pl. Exh. 667)**

2. *General.* b. *Air National Guard*—The National Guard Bureau is charged with administering approved Department of the Air Force policies other than those relative to training, for the Air National Guard not in the Federal service, and with promulgating Department of the Air Force directives and regulations applicable to the Air National Guard, including those relative to training (J.A. 688).

4. *National Guard Bureau Regulations.* a. The National Guard Bureau will, from time to time, publish joint National Guard Regulations when such regulations are applicable to both the Army and Air National Guard, or separate National Guard Regulations when such regulations are applicable to the Army National Guard only or to the Air National Guard. National Guard Regulations will govern the Army National Guard and the Air National Guard when not in Federal service in the same manner as Army Regulations or Air Force Regulations govern the Regular components of the service.

b. Joint National Guard Regulations will be issued subject to the approval of the Chief Staff, United States Army, and the Chief of Staff, United States Air Force. National Guard Regulations pertaining to the Army National Guard only will be issued subject to the approval of the Chief of Staff, United States Army. National Guard Regulations pertaining to the Air National Guard only will be issued subject to the approval of the Chief of Staff, United States Air Force (Pl. Exhs. 669-670).



**Defendant's Exhibit 9. ANGR 50-01 (Pl. Exh. 671)**

1. Training authority: The requirements to be met and the sources of authority for the training and instruction of the Air National Guard not in Federal service are set forth in the following:

a. Sections 5, 91, 92, 93, 94, 96, 97, and 99, National Defense Act, as amended, and Sections 201 and 501, Public Law 351, 81st Congress, hereafter referred to as Career Compensation Act of 1949.

b. Air National Guard Regulations.

c. The policies of the Department of the Air Force.

d. The orders, instruction, and training announcements issued by the Chief of Staff, United States Air Force pursuant to authority specifically delegated to him by the Secretary of the Air Force.

e. The orders and detailed instructions promulgated by the Chief, National Guard Bureau to the Air National Guard not in Federal service with the approval of the Chief of Staff, United States Air Force, in amplification of, and to make effective, the policies indicated in c above.

2. National Guard Bureau Instructions. The Chief, National Guard Bureau is charged with promulgating to the Air National Guard not in Federal Service, from time to time, the necessary orders and instructions to make effective the Department of the Air Force training policies.

a. The training of the Air National Guard will conform to the Department of the Air Force policies and directives as prescribed for the Regular Air Force.

b. It will be conducted by the Air National Guard organizations of the respective States under the supervision of the commanding generals of the appropriate major

**5 United States Code 751**

forces, in accordance with the policies prescribed by the Department of the Air Force. Such supervision will be exercised by:

1. Preparation of training directives.
2. Supervision of United States Air Force Instructors.
3. Authority to conduct inspections.
4. Conduct of tests.
5. Furnishing the Department of the Air Force with appropriate reports on state of training and recommendations for necessary remedial actions (Pl. Exhs. 671-673).

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**5 United States Code 751**

Disability or death of employee: willful misconduct. The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death. (Sept. 7, 1916, c. 457, Sec. 1, 39 Stat. 742.)

**Article 1A, sec. 10, pg. 197, Annotated Code of  
Maryland, 1951**

(Collision of Aircraft): The liability of the owner of one aircraft to the owner of another aircraft, or to airmen or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land.